UNITED
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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 741

Case No. 796: MIKDASHI

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 31 January 1994, Samia Mikdashi, a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, hereinafter referred to as UNRWA, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 9 May 1994, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia, to order:

"1. [Her] reinstatement to [her] former position before demotion.

2. UNRWA to issue a letter of apology.

3. Payment of all back-pay due to [her, including]:

(a) ... relocation allowance: L.L. 2,000,000 (approximately US$ 3,500).

(b) ... Senior Manager Allowance: L.L. 4,000,000 (approximately US$ 7,000).

4. Compensation equal to four years net base salary for the damage to [her] professional reputation, moral and personal suffering, as [she has] been denied the satisfaction of continuing to work in a job of high interest and responsibility, all that due to UNRWA's unjustified and unwarranted treatment, i.e. L.L. 108,000,000 (approximately US$ 60,000.-).

5. Lawyer's fees: US$ 5,000.

6. Expenses: US$ 2,000."

Whereas the Respondent filed his answer on 28 October 1994;

Whereas the Applicant filed written observations on 22 March 1995;

Whereas, on 19 June 1995, the Respondent submitted additional observations;

Whereas, on 1 August 1995, the Applicant submitted additional observations, together with a document;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 1 April 1965, as a Medical Officer "B" at grade 14, on a temporary indefinite appointment, in the Rashidieh Camp Clinic, Tyre Area. On 1 July 1968, she was transferred to the post of Medical Officer "A" in the Ein El Hilweh Camp Health Centre, Saida Area. On 1 October 1980, the Applicant was transferred to the post of Deputy Field Health Officer, grade 17, in the Lebanon Field Office. With effect from 1 April 1981, she was promoted to grade 17. On 1 June 1986, the Applicant was reassigned to the post of Field Preventive Medicine Officer, grade 16, with salary and grade protection. With effect from 1 May 1988, the Applicant was granted a Senior Manager Allowance. On 15 April 1990, she was transferred on special assignment to the post of Medical Officer "B" at the Beirut

Polyclinic Unit, with grade and salary protection, and with effect from that date, the Senior Manager Allowance was withdrawn.

In a memorandum dated 19 March 1990, the Director of UNRWA Affairs, Lebanon, informed the Applicant that a "scientific assignment", in reference to a study on the causes of growth failure among Palestine refugee children under 3 years of age, "will require your travel in the field" and that with effect from 15 April 1990, she would be transferred to the post of Medical Officer at Beirut Polyclinic, with grade and salary protection. In a memorandum dated 21 March 1990, to the Director of Health, UNRWA Headquarters, the Applicant expressed her surprise at receiving notice of a special assignment and transfer, as "the study on growth failure among children 0-3 years has already started in Lebanon Field."

On 2 October 1990, the Field Health Officer, Lebanon, informed the Applicant "your special assignment on subject is to be discontinued and, I expect from you to continue your duties as Medical Officer "B" at Beirut Polyclinic (I)."

On 15 June 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the decision to transfer her from the post of Field Preventive Medicine Officer to Medical Officer "B". On 19 July 1993, the JAB adopted its report. Its evaluation, judgement and recommendation read as follows:

> "III. Competence of the Board
>
> 13. The Board submits at the outset that on the face of it this application is barred by efflux of time between the date of the administrative decision to transfer the Applicant and the date of the amendment of Area Staff Rule 111.3 governing appeal procedures and which has broadened the range of decisions to be appealed from to include contestation of decisions other than those of termination and disciplinary measures. However, the Board unanimously resolved to waive time limits applicable in this case and to entertain the appeal within its jurisdiction in accordance with Area Staff Rule 111.3(4) and 111.1(5) respectively, for two reasons: the short span of time between the date of the Applicant's latest transfer and the date of amending Area Staff Rule 111.1

governing appeal submissions and procedures; and more important the continuity of the impact of the administrative decision taken in respect of the Applicant to date while the Applicant (henceforth referred to as Appellant) is still a staff member of the Agency coupled with the special merits of the application (henceforth referred to as the appeal).

...

V. Evaluation and Judgement

14. The Board in its deliberations noted that it is the prerogative of the Administration to transfer a staff member from one post to another so long as the action of transfer is a disciplinary measure or an administrative measure in the interest of the Agency. In this case it is obvious that the action of transferring the Appellant was purely an administrative measure as the transfer was effected with salary and grade protection. All that remains is the action of stopping the Senior Manager Allowance which the Appellant had enjoyed in her previous posts as Deputy Field Health Officer and Field Preventive Medicine Officer.

In this regard the Board has taken note of Personnel Directive No. A/21 dealing with the designation of Senior Managers and Senior Management Allowance and has concluded that this Senior Manager Allowance is given to a staff member only when he is the incumbent of a Senior Manager post.

Therefore, as a Medical Officer which is not a Senior Manager post, the Appellant is not entitled to the Senior Manager Allowance nor can claim it to be an acquired right.

Nevertheless, the Board makes its reservation on the circumstances of transferring the Appellant from a Senior Manager post to the post of a Medical Officer without having shown or mentioned that the action of such transfer is warranted by the interest of the Agency and hence the Board can hardly conceive the propriety of the transfer of the Appellant.

VI. Recommendation

In view thereof, the Board unanimously makes its recommendation to review the decision of transferring the Appellant to the post of Medical Officer with a view to establishing proper reconciliation of the Appellant's status with the Agency in terms of function and/or title."

On 1 October 1993, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed her as follows:

> "... You will see that, although the appeal was time-barred, the Board, nonetheless, decided to waive the applicable time limits and to entertain the appeal. The Board also noted that it is the prerogative of the Administration to transfer a staff member from one post to another so long as the transfer was either a disciplinary measure or in the interest of the Agency, but proceeded to express a reservation on the circumstances of your transfer to the post of Medical Officer 'B' on the grounds that the Agency had not explained how the transfer had been justified by the interest of the Agency. Accordingly, the Board recommended that the decision to transfer you be reviewed with a view to establishing proper reconciliation of your status with the Agency in terms of function and/or title.
>
> At the time the transfer was made effective, namely 15 April 1990, Area Staff Regulation 11.1(A) did not provide for the decision to transfer you to be treated as a ground of appeal. Indeed, it was more than a year later on 14 June 1991 that extended grounds of appeal were introduced, and the wording and intent of the amendment was that it should be applied prospectively. I, therefore, cannot agree that the Joint Appeals Board had jurisdiction to entertain your appeal.
>
> Notwithstanding the above, to ensure fairness, the circumstances of your transfer have been reviewed as recommended by the Board. It is on record that on 23 February 1990, the Director of Health wrote to the Director of UNRWA Affairs, Lebanon, concerning the need to study in depth the causes or factors associated with moderate/severe growth failure in infants and young children under three. The Director of Health proposed that this assignment be given to a Senior Medical Officer, preferably one with a post-graduate Public Health degree. You fulfilled all requirements, including holding a Master's degree in Public Health, and were therefore chosen for the position. This shows that the decision to transfer you was not taken arbitrarily but in the clear interest of the Agency, and that you were well qualified for the position."

On 3 November 1993 and again on 4 January 1994, the Applicant wrote to the Commissioner General, requesting reconsideration of her

case. In a reply dated 10 January 1994, the Officer-in-Charge, Department of Administration and Human Resources, UNRWA Headquarters, advised the Applicant, "I confirm that your transfer was in the interest of the Agency and did not result in any demotion whatsoever ... In light of the above, I see no reason to reconsider the previous decision."

On 9 May 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The transfer of the Applicant was a demotion, and hence, a disciplinary measure.

2. The Applicant was never charged with unsatisfactory performance or misconduct.

Whereas the Respondent's principal contentions are:

1. Neither the Applicant nor the JAB has articulated any "exceptional circumstances" which would justify entertaining the Applicant's appeal long after the expiration of the applicable time limits.

2. The Respondent's decision to transfer the Applicant was proper and in accordance with its rules. The Applicant, as a result of her long experience and qualifications, was the staff member best qualified to perform the important task to which she was assigned.

3. The Tribunal should not interfere with the Commissioner-General's discretion in transferring a staff member as long as the transfer is in the interest of the Agency and is not improperly motivated.

4. The Applicant's contention that she was demoted rather than administratively transferred is not supported by the facts and is contrary to the plain meaning of the Respondent's rules.

The Tribunal, having deliberated from 30 October to 22 November 1995, now pronounces the following judgement:

I. The initial question to be considered by the Tribunal is that of receivability.

The Applicant was notified of the new appointment by letter of 19 March 1990, the appointment to take effect on 15 April 1990.

The Respondent made the case to the Joint Appeals Board (JAB) that the appeal was time-barred, as the appeal was not lodged until 15 June 1992. The Respondent also referred to the Area Staff Regulations and pointed out that prior to 14 June 1991, the Regulations did not provide for an appeal against an administrative decision other than for termination of services. The Respondent therefore says that the appeal could not properly have been taken under the Regulations.

II. The JAB's conclusion with regard to waiving the time bar will not be overturned by the Tribunal in this case. In the Tribunal's view, the JAB properly held that the appeal was receivable. Although the appeal was not formally lodged until 15 June 1992, there can have been no confusion on the part of the Administration that the Applicant was questioning the proposal and was dissatisfied with it. This is clear from the Applicant's letter of 21 March 1990. At that time she had no further recourse available.

III. The Tribunal rejects the Respondent's argument in relation to the Applicant's transfer, that, because the change in the Regulations did not occur until 14 June 1991, the Applicant was debarred from appealing against this action. The Tribunal has no hesitation in concluding that it would be unfair to prohibit the Applicant from appealing while her colleagues in a similar position could appeal a similar decision taken after 14 June 1991.

IV. On the substantive issue, the Applicant's complaint relates to what she sees as a demotion. She says that she was downgraded from Field Preventive Medicine Officer, grade 17 to Medical Officer "B", grade 14.

The Respondent says that the decision to assign the Applicant to the new position was made because of the Applicant's qualifications and the importance of the assignment. The Respondent contends that he did not act arbitrarily and that he took the decision in the best interest of the Agency. He refers to Area Staff Regulation 1.2, which provides that staff members are subject to the authority of the Commissioner-General and to assignment to any of the activities or offices of the Agency.

The Respondent refers to the Tribunal's position that it will not interfere with the Commissioner-General's discretion in transferring its staff members if the transfer is in the interest of the Agency and is not improperly motivated.

V. While the assignment which the Applicant was given was clearly of importance and its success a worthy objective, there were, seemingly, unfortunate consequences for the Applicant.

The Applicant contends that she was moved so that her post could be given to another specified individual and she suggests that it was not necessary to transfer her to ensure the success of a project in which she was already involved, and which was well on its way to a successful conclusion.

VI. While the Tribunal notes the Applicant's statements in these matters it does not have to rely on them in reaching a conclusion.

The Tribunal recognizes the Commissioner-General's discretion in the matter of the allocation of staff, but it concludes that, in the absence of more convincing justification, his action must, in this case, be considered unfair and unjust and to have the appearance of arbitrariness.

In transferring the Applicant, consideration should have been given to the matter of her status. She says that she was demoted. The Respondent denies this, but does so in a contradictory way. While saying that she retained her grade and salary level, he also acknowledges that she was notionally at a lower grade. The Respondent also contends that, under the rules, there can be a demotion only if there is reduction in salary.

VII. The Tribunal considers, despite the Respondent's arguments, that the Applicant was clearly placed on a less favourable career path. She was forced to occupy a post which carried a lower grade and even when the special assignment was concluded, she continued to do so. While it is the Tribunal's view that she should not have been assigned to a lower-graded post in the first place, it appears to the Tribunal even more strongly that she should not have been forced to continue in a post at that level.

In relation to the Respondent's argument that demotion carries with it ensuing loss of salary, the wording of the Rules does not necessarily involve such a component. In fact, PD/A/10/Rev.1/Amend.1, paragraph 9.1, states that although demotion "should involve a loss of salary" it also says that "the loss may be minimized". Furthermore, this rule defines demotion as "the transfer of a staff member from his/her post to another post at a lower grade." The Tribunal also notes, in this regard, that while the Applicant's Senior Manager Allowance might not be regarded strictly as salary, the fact that she lost it introduces another element of hardship for the Applicant.

VIII. For the foregoing reasons, the Tribunal orders that:

A. The Applicant be reinstated to her grade 17 post or an equivalent post at grade 17.

B. If the Secretary-General, in accordance with article 9, paragraph 1 of its Statute, within thirty days of the notification

of this judgement, decides, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in her case, the Tribunal fixes the amount of compensation to be paid to her at three months of her net base salary.

C. In addition, as compensation, the Respondent pay to the Applicant the amount of six months of her net base salary.

IY All other pleas are rejected, including the Applicant's request for costs.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 22 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary